UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SAN FRANCISCO BRANCH OFFICE DIVISION OF JUDGES

H. D. CONSTRUCTION SUPPLY, LTD., d/b/a WHITE CAP CONSTRUCTION SUPPLY, Employer

and

Case 20-RC-18177

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 853
Petitioner

David Reeves, Atty., NLRB Region 20, San Francisco, CA, on behalf of the Regional Director.

Ronald J. Klepetar, Atty., with Dawn Kennedy, Atty., on the brief, of Baker & Hostetler, LLP, Los Angeles, CA for the Employer.

Susan V. Stucker, Atty., Labor-Employment Counsel, H.D. Construction Supply, LTD., Orlando, FL., for the Employer.

Andrew H. Baker and Zachary Leeds, Attys., Beeson, Tayer & Bodine, Oakland, CA, for the Petitioner.

RECOMMENDED DECISION ON CHALLENGED BALLOTS AND EMPLOYER OBJECTION NO. 1

WILLIAM L. SCHMIDT, Administrative Law Judge. On August 27, 2008, I conducted a one-day hearing on challenged ballots and the Employer's Objection No. 1, pursuant to the notice of hearing dated August 6, 2008, issued by the Regional Director for Region 20.

The election at issue was conducted on June 20 pursuant to a Decision and Direction of Election (D&DE) issued on April 25 following a hearing largely devoted to unit composition issues. In the D&DE, the Regional Director found the following unit appropriate for collective-bargaining purposes:

All full-time and regular part-time drivers, warehouse employees, lead warehouse employees, warehouse receiving employees, tool room employees, dispatchers, inventory control employees, counter sales employees, lead counter sales employees,

¹ Where not shown otherwise, all further dates refer to the 2008 calendar year.

inside sales employees, and cashier/receptionist employees employed by the Employer at its San Francisco, California facility; and excluding all account managers, territory sales assistant, branch manager, assistant branch manager, warehouse manager and purchasing/inventory control manager, guards and supervisors as defined by the Act.

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The tally of ballots prepared and provided to the parties immediately following the election reflected 31 votes cast for the Petitioner, 29 against, and 3 challenged ballots, enough to be determinative of the outcome.

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Thereafter, the Employer filed seven objections to the election. Following an administrative investigation, the Regional Director issued a Supplemental Decision sustaining all of the challenged ballots and overruling all of the objections. The Employer filed a request for review with the Board and a motion for reconsideration with the Regional Director. After considering that motion, the Regional Director issued a Second Supplemental Decision finding that the challenged ballots and Employer's Objection No. 1 raised material issues of fact warranting a hearing. The Regional Director did not alter his prior decision concerning the other objections. Hence, only the three challenges and Employer's Objection No. 1 are before me.

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Pursuant to the Regional Director's notice, I conducted the hearing on August 27 at San Francisco, California. The hearing provided the parties with the opportunity to call and examine witnesses, to introduce relevant documentary evidence, to argue procedural and substantive issues, and to file post-hearing briefs. After carefully considering the hearing record in light of my credibility determinations,² and the arguments detailed in post-hearing briefs of the Employer and the Petitioner, I recommend that the Board sustain the challenges and overrule Objection No. 1 based on the following findings.

1. The Challenged Ballots

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The Petitioner challenged the votes of Sheldon Appel, Matthew Barroero and Rita Dumais. The Petitioner argues that their challenged ballots should be sustained because the three employees are not employed at the Employer's San Francisco facility and, hence, they are not part of the unit found appropriate in the D&DE. The Employer readily concedes that the three employees work full-time at San Rafael, California, with account manager Don MacGregor. However, the Employer asserts that the three belong in this unit because they are inside sales employees, an included classification, who share a community of interest with the other unit employees, and who are administratively attached to the San Francisco warehouse and supervised from there.³

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² I considered the following factors in making my credibility resolutions: the opportunity to be familiar with the subjects covered by the testimony given, established or admitted facts, witness bias, testimonial consistency, corroboration, the strength of any rebuttal evidence, inherent probabilities, reasonable inferences available from the record as a whole, the weight of the evidence, and witness demeanor while testifying. Although the conflicts in the testimony here are minor, any testimony inconsistent with my findings below has not been credited.

³ Citing *Caesar's Tahoe*, 337 NLRB 1096 (2002), the Petitioner contends that it would not be appropriate to consider community of interest criteria in resolving the challenged ballots. I find *Caesar's Tahoe* and like cases distinguishable as they pertain to stipulated units. As noted, the election in this case was directed. Board deference for the parties' stipulation underlies the analytical process adopted in *Caesar's Tahoe*. Hence, Board does not engage in a community of interest analysis in those cases if, initially, it finds the parties' stipulation unambiguous.

Originally, the Petitioner sought to represent essentially a unit of drivers, warehouse employees, and counter sales employees at the Employer's San Francisco facility. Alternatively, the Petitioner asked to represent a unit comprised of just the drivers and warehouse employees at that facility if its first proposed unit was found inappropriate. The D&DE resolved the parties' disputes regarding unit placement of the inside sales employees located at San Francisco but Petitioner now opposes the inclusion of the inside sales employees who work full-time at a separate sales location in San Rafael, California.

The D&DE also reflects that the parties agreed to exclude the outside salespeople (a/k/a account managers), including Don MacGregor, a central figure in this matter, on the ground that they lacked "a community of interest with other unit employees because they: (1) are paid on commission basis; (2) do not report to the managers at the San Francisco facility, but rather to higher-level division or district managers; and, (3) solicit sales in areas not limited to the area serviced by the San Francisco facility. Although the outside sales employees have rough territorial guidelines, the geographic scope of their work is actually defined on an account basis. Accordingly, MacGregor services accounts located from San Jose to the Oregon border and east to the mountain range near Livermore that separates the Bay Area from the California's Central Valley. Even so, MacGregor has at least one client in Sacramento and jointly serves a few clients with other account managers.

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The evidence adduced at the August 27 challenges and objection hearing largely confirmed the following basic facts found by the Regional Director in his July 21, 2008, Supplemental Decision:

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[T]he Employer . . . admitt[ed] that the three challenged voters are inside sales employees who "generally report to work out of an office located at 140 Whittier Avenue in San Rafael, California, and not out of the Employer's San Francisco facility" The Employer explain[ed] that the three challenged voters are regularly assigned to work out of the San Rafael location because they handle order-taking for Outside Salesperson Don MacGregor. Like them, MacGregor works out of the San Rafael office, and assertedly generates a volume of business large enough "to keep a number of inside salespeople busy nearly full-time taking orders from his clients." [Footnotes omitted]

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The Employer operates at least 160 warehouse-sales facilities nationwide. Seventy are located in California. In addition to its San Francisco warehouse-sales facility, the Employer has at least four other Bay Area warehouses with counter and inside sales personnel. They are located at Santa Rosa, Concord, San Leandro, and San Jose. The facility at San Rafael where Appel, Barroero, and Dumais work has no warehousing, counter sales, or transportation operations; it is strictly used as an office for account manager MacGregor and the three inside sales employees who service his clients exclusively. The San Rafael offices are located at MacGregor's home in a residential neighborhood.⁴ Appel also lives there. Its location is between 30 to 40 miles from the San Francisco facility and roughly equidistant between the Employer's San Francisco and Santa Rosa warehouse-sales facilities.

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Dumais started with the Employer in early January and has worked at San Rafael the entire time. Barroero has worked for the Employer for about five years. His employment started at the San Leandro warehouse-sales facility and he worked there until he learned of an opening

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⁴ In the Supplemental Decision, the Regional Director noted the Employer's position letter stated that there are several buildings at the San Rafael location. Barroero testified that MacGregor's home is the only structure on the property at 140 Whittier Avenue.

to work with MacGregor for which he applied. His transfer, effective in February, was ultimately approved well beyond the store level. He commutes daily to San Rafael from his home in Castro Valley, a community southeast of San Leandro. Appel has always worked at San Rafael since his employment began in March 1999.

Barroero reports for work at 6:30 a.m.; Appel and Dumais start at 8:30. MacGregor is always there at the start of their shifts and sometimes returns from calling on customers before the end of their work day. All three inside sales employees basically work an eight-hour day and record their time cursively on individual time sheets. Their offices amount to converted bedrooms at the Whittier Avenue residence. Unlike their San Francisco counterparts, the San Rafael employees have no dress code as they almost never have face-to-face contact with customers. All of the office equipment at that location is owned by the Employer. The computer equipment is tied in with the Employer's T-1 line at the San Francisco facility. When office supplies at San Rafael, MacGregor obtains them from a local big-box office supply company.

In terms of sales work, the three San Rafael employees perform nearly identical functions as the San Francisco inside sales employees. As described by Barroero, the only one of the three who testified, their work consists of taking calls from the outside salesman (MacGregor in their case) or a customer MacGregor has contacted, writing up customer purchase orders, transmitting purchase orders via a computer program to a warehouse facility that will fill the order, and following up on the orders by calling the warehouse dispatchers or supervisors to learn shipping or will-call details. Activities incidental to these primary duties include checking availability of stock and planning the routing of shipments. For the greater part of his workday, MacGregor travels around calling on customers but has frequent telephone contact with the three other San Rafael employees.

Customer orders are routed to different warehouses based on the nature of the product ordered and the availability of stock. The San Francisco warehouse is unique in that it stocks materials and supplies used by building contractors involved with industrial and commercial projects. By contrast, the San Leandro warehouse, for example, primarily stocks materials and accessories for concrete projects. If the inside sales person receives a request for the type of products usually found at San Francisco, the order is placed there; if the request is for supplies stocked at San Leandro (or another warehouse), the order is placed at that location. For the inside sales person, the task is virtually the same regardless of the warehouse location that fills the order. After checking to see if the product ordered is in stock, the inside sale person selects the location of the printer in the warehouse where the order will be placed from her/his computer's printer menu and sends the order. The order prints out at the warehouse to which the order is submitted and personnel at that location pull the order and arrange for delivery to the customer. Barroero estimated that 20 to 25% of the orders he writes are submitted to locations other than San Francisco. The placement distribution of the orders written by Dumais and Appel, and hence the focal point of their tracking efforts, is not known.

The San Rafael employees have a significant amount of daily telephone and computer contact with the San Francisco inside sales and warehouse personnel. Thus, the San Rafael employee will telephone an inside sales or warehouse person in San Francisco if there is any doubt about the availability of a product in order to obtain an in-person confirmation that the product about to be ordered is available on the warehouse shelf. In addition, virtually all of the order follow-up work is done by telephone contact with the warehouse supervisor, dispatcher or even a warehouse employee. If a customer seeks to pay by credit card for a single order, the inside sales employee reports the payment information to the San Francisco cashier for processing. Clearly, however, these San Rafael-San Francisco contacts are product driven so

that the San Rafael employees would have similar telephone contacts with the Concord, Santa Rosa, San Leandro, or San Jose warehouse-sales persons for products ordered there.

Face-to-face contact and interchange between the San Rafael employees and the San Francisco employees is all but non-existent. Some witnesses at the challenges and objections hearing had never met the San Rafael employees until they attended the Employer's meeting at the San Francisco warehouse about the union organizing campaign or when they appeared the next day to vote in the election. This seemed particularly striking in Appel's case in view of his nine-year tenure. Since his transfer from San Leandro, Barroero has stopped once at the San Francisco warehouse to pick up a customer order enroute to work at San Rafael. Rene Lagrimas, who has worked as a San Francisco inside sales person for six years, saw Barroero for the first time on that occasion and met Appel and Dumais for the first time on the day of the election. Lagrimas never heard of a San Francisco employee going to San Rafael to work and no evidence shows that this has ever occurred. Although uncertain, Barroero thought his replacement for the day when he testified at the challenges and objections hearing came from the Santa Rosa facility.

In the past, a San Francisco driver would drop items off or pick up returns from the San Rafael location about once a week. However, since Barroero's transfer, the frequency of the San Francisco driver's visits to San Rafael has fallen off to about once a month. This is occasioned by the fact that Barroero picks-up orders and drops returns at the San Leandro warehouse which is near the route he uses for his commute to San Rafael.

As noted, the three inside sales employees at San Rafael are administratively attached to the San Francisco warehouse. For that reason, the branch manager at San Francisco has responsibility for preparing their performance evaluations. However, MacGregor has prepared Appel's performance evaluation at least once in the past (Petitioner's Exhibit 1) and Barroero said the branch manager's performance evaluation is based on a review submitted by MacGregor that addresses their productivity, customer service, sales performance and attendance. Jon Zinc, the San Francisco assistant branch manager, is the immediate supervisor of the inside sales employees there and technically serves as the direct supervisor of the San Rafael employees.

Even though the branch manager and the assistant branch manager have some telephone contact with the inside sales employees at San Rafael, their face-to-face contact is negligible. Thus, acting branch manager John Roberts has been at the Whittier Avenue location only twice since Barroero transferred there and assistant manager Zinc has never been there during that period of time. The San Rafael employees call MacGregor if they are going to be absent from work. MacGregor certifies the time cards for the San Rafael employees on some occasions and Zinc does so at other times. In addition, MacGregor signed off as Dumais' manager for the distribution of a company policy statement. (Petition's Exhibit 2). Patti Baker, the regional human resources manager whose office happens to be located at the San Francisco facility, approves vacations for the San Rafael employees. No replacements are provided if a San Rafael employee is absent. Instead, the remaining employees cover the missing person's work.

All inside sales employees perform essentially the same type of work utilizing similar skills and equipment. Like their San Rafael counterparts, the inside sales employees at San Francisco are all assigned to work with an outside sales person but, unlike the San Rafael employees, those at San Francisco do not work exclusively for the outside sales person to

whom they are assigned.⁵ The San Rafael and San Francisco inside sales employees enjoy similar wage rates and benefits. In addition, the San Rafael employees participate in the San Francisco bonus pool. For that reason their sales volume is pooled with the sales generated at San Francisco in computing their bonuses.⁶ Both groups receive SPIFFs but this is essentially a payment from certain manufacturers for the sale of particular types of products. Hence, this is not an Employer provided benefit.

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The findings in the D&DE about the work and integration of the inside sales employees located at San Francisco makes clear that their inclusion rests primarily on their temporary interchange with the adjacent counter sales employees whose inclusion was not at issue. Thus, the D&DE finds:

The record reflects that the inside sales area must always be staffed during regular business hours. Inside sales employees take telephone calls from customers, vendors and account managers and input product orders into the computer. They answer customers' questions, make recommendations, give estimates and price quotes, and use computers to check on stock availability and delivery times. They also retrieve customer orders from the warehouse and deliver products to the cashier's window for will-call pick up or to the warehouse shipping area for delivery. While, generally, warehouse employees pull the products to fill the orders taken by inside sales employees, inside sales employee Jeanette Brickley testified that, about two or three times each day, she pulls products from the warehouse and, about ten to twelve times a day, she checks stock in the warehouse at the request of customers or account managers. According to Brickley, she spends about 10% of her time in the warehouse. One inside sales employee drives a fork lift, although this skill is not required for the inside sales job. Typically, inside sales employees possess more product knowledge and experience than do counter sales employees. Like counter sales employees, part of the job of the inside sales employees is to develop relationships with customers who may ask for them by name.

As indicated above, throughout each work day, two of the inside sales employees work at the sales counter with counter sales employees. Counter sales employees also substitute twice a week for inside sales employees at times when the latter are absent or on vacation or when inside sales is very busy. As indicated above, the lead counter sales employee, on a daily basis, spends a couple of hours in the office area, inputting sales and credit transactions into the computer. Other than substituting for counter sales employees, there is no evidence that inside sales employees substitute for employees in any other classification.

Based on these findings, the D&DE concludes that the "two classifications have a high degree of interchange, with two of the eight inside sales employees regularly working on the counter on a daily basis and with counter sales employees substituting for inside sales employees about

⁵ On occasion, the San Rafael employees may deal with another account manager but only in situations where that account manager and MacGregor share the account jointly.

⁶ The Employer provided an additional bonus incentive covering this past May and June for the San Francisco employees. Dumais is not listed as a participant. Roberts explained her omission resulted from the fact that the criteria applied to this bonus incentive covered periods prior to her employment. If that is so, then at least a part of Barroero's qualifying sales occurred while he was employed at San Leandro.

twice a week." The Regional Director further concluded that other day-to-day contacts, common supervision, and the lack of any bargaining history supporting their separation required that the counter sales and inside sales employees be grouped together.

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Despite their administrative connection with the San Francisco warehouse-sales facility and their putative supervision by managers there, none of the essential criteria relied on by the Regional Director to include the San Francisco inside sales employees in the unit found appropriate apply to the San Rafael employees. There is almost no face-to-face contact for supervisory purposes between the San Francisco management and the San Rafael employees. Given the basis for their unusual location and setup, i.e., MacGregor's prolific sales record, I find it reasonable to infer that the San Rafael inside sales employees virtually serve at his pleasure and that the essential direction and supervision of those three employees on a day-in and day-out basis comes from MacGregor rather than anyone at San Francisco.

On the basis of the facts set forth above concerning the San Rafael employees, I have concluded that the San Rafael operation is sufficiently autonomous so as to preclude the inclusion of those employees who work there in the San Francisco unit. *Esco Corp.*, 298 NLRB 837 (1990). See also *AVI Foodsystems*, *Inc.*, 328 NLRB 426 (1999). This autonomy is strongly supported by the thirty to forty-mile geographical separation between the two locations, the total lack of interchange or even any face-to-face contact between employees at the two locations, the substantial day-to-day authority MacGregor exercises over the San Rafael employees, and the different working conditions at San Rafael resulting from their distinctive work location and exclusive assignment to MacGregor.⁸ For these reasons, I recommend that the challenges to the ballots of Sheldon Appel, Matthew Barroero, and Rita Dumais be sustained.

2. Employer Objection No. 1

The facts pertaining to the objection are not complicated. On June 20, the day scheduled for the election, the Board agent who conducted to the election arrived at the Employer premises a short period before the pre-election conference scheduled for 1:15 p.m.⁹

⁷ If the San Rafael employees are included, the actual number of inside sales employees involved here is nine. See Employer's Exhibit 15. For whatever reason, on virtually all of the personnel records in evidence pertaining to Appel, reflects that he is classified as a "counter sales" employee. Acting branch manager Roberts asserted that Appel, in fact, is an inside sales employee and the company records merely misclassify him. Regardless, no counter sales operation exists at San Rafael. Even though this so-called misclassification obviously has been known for guite some time, no apparent action has been undertaken to correct it.

⁸ Petitioner moved to strike two sentences from the Employer's brief on the ground that no record support exists for the claims made. Petitioner would strike the brief's assertion on Page 12 that San Rafael is, in effect, a telecommuting arrangement that will end if some change occurs in MacGregor's living arrangement or, presumably, employment. In that event, the Employer asserts, the employees will be returned to San Francisco. I deny the motion. The circumstances support an inference that the operation at San Rafael would likely end if MacGregor's living arrangements are significantly altered or his employment ceases. Of course, the relocation of the San Rafael employees in that case is obviously speculative.

⁹ The scheduled voting period began at 2:00 p.m. and closed at 6:30 p.m. Board agent Paula Katz conducted this election. Two student legal interns accompanied Katz to observe. At the hearing, Petitioner sought Katz' testimony as to whether she saw anyone other than the executives in the parking lot when she arrived. I denied that request on the ground that such testimony would have little or no probative value.

Martin Linka, the director of operations for the Employer's upper west region, and Bob Jacoby, the regional vice president for the Employer's western region, met the Board agent at the entrance to the customer parking lot and guided her to a parking space reserved for her near the entrance to the facility. The two Employer officials then waited while the Board agent parked, and retrieved a collapsible voting booth and the election materials from her trunk.

While waiting, Linka and Jacoby noticed the bright-orange, rear license-place frame on the Board agent's auto. The words "Go Giants" (a reference to San Francisco's major league baseball team) appeared in bold black letters across the bottom border of the license-plate frame. The words "Go Union" appeared in smaller but equally bold black letters across the top of the license place frame. See Employer Exhibits 1(a) and (b). Neither of the Company officials spoke to the Board Agent about the license-plate holder at that time or later.

The parking lot involved is reserved for use by customers who purchase goods at the counter sales desk or who have arranged to have the item available at the will-call office. Employees are frequently in this parking lot assisting customer's load and unload materials. According to Linka, June 20 was an unusually busy day and several employees were in the parking lot assisting customers when the Board agent arrived. However, Linka could not recall the identity of any employee in the parking lot at that time. No evidence establishes that any employee who may have been in the parking lot at the time also observed the license plate frame and connected it with the Board agent who was about to conduct the election. Likewise, no evidence establishes that any employee at the San Francisco facility knew the Board agent by sight prior to the election nor is there any evidence that any employee was familiar with the typical paraphernalia used by the Board agents to conduct an election.

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Instead, employee knowledge connecting the license-plate frame with the Board agent came about through another means. Sometime after the arrival of the Board agent but before the voting began, acting branch manager Roberts approached Katie Nowlin, an inside sales employee and an eligible voter, at her desk and spoke to her about the license plate frame. Nowlin testified as follows about this exchange with Roberts (R32: 5-17):

- Q And what did he say to you?
- A He asked me if I had my camera with me and I said I did, and he was uncomfortable with using it, so he asked me if I would go take a picture.
- Q Did he tell you what he wanted you to take a picture of?
- A Yeah, the license plate frame on a car, in the parking lot.
- Q And did he tell you whose car that was?
- A Yes, he did.
- Q What did he say?
- A He said it was the representative from the NLRB's vehicle.
- Q Did you in fact go out and take pictures of that car?
- A I did.

Roberts did not accompany Nowlin when she went to the parking lot and took the pictures.

Instead he told Nowlin where the car was parked and described the license-plate frame to her. I

¹⁰ Linka and Jacoby posted themselves at the gate to the customer parking lot and controlled access to it by questioning occupants of the vehicles approaching the parking lot about their reason for being there. Although customers were permitted to enter, they refused admittance to the Petitioner's agent Pilar Barton and a colleague "until the election time."

infer that either Linka or Jacoby told Roberts about the Board agent's license-plate frame as no evidence establishes that Roberts had independent knowledge of it.

Had Roberts not identified the Board agent's auto to Nowlin, she would have not known about it. In addition, Roberts never instructed Nowlin what to do with the pictures once taken. No evidence shows that Nowlin spoke to Roberts concerning the pictures after she took them. Her next interaction with Roberts about this matter came a few days later after Nowlin printed copies of the pictures and gave them to Roberts because she assumed he wanted them since he asked her to take them.

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After Nowlin took the two pictures of the license-plate frame on the Board agent's auto, she began showing them to other unit employees who, like her, had not yet voted. Rene Lagrimas saw the pictures and described her reaction this way: "Well, the first time I saw it, yes, I didn't think it's right, since for an employee of the NLRB to have that logo of "Go Union," it's, I think, bias." After she voted, Lagrimas went to parking lot and looked at the license plate frame.

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Nowlin displayed one of the pictures (Exhibit 1(a)) to Eric Wiesenhaven, also an inside sales employee, and told him the auto belonged to the NLRB agent there to run the election. Wiesenhaven told Nowlin that "it wouldn't seem right that she should be having something on her car that would say 'Go Union.'"

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Nowlin showed the photos to Fernando Orellana, another inside sales employee, as well as other gathered around in their office area and stated, "you know, what I just saw," and then displayed her pictures showing the "government rep . . . her car had a "Go Union" in gold."¹¹

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Eric Borst, a warehouse and inventory control employee who voted in the election, never saw the photos until the following Monday. However, after Borst had voted, Nowlin told him about the pictures and said that the "person who was overseeing the election had a license plate that . . . was pro union."

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Linka claimed that he overheard a lot of "buzz" about the photos when he returned from escorting the Board agent to the election location. However, Linka could not identify which employees were present other than Nowlin and Laura Poole, another inside sales employee who served as was the employer's election observer.

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The Employer argues that the election should be set aside because the Board agent's partisan display on her automobile breached the Board's neutrality and the integrity of the Board's election procedures. In support, the Employer relies on the principles established in *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967) and its progeny. The Petitioner argues that the Board agent's conduct, though careless, amounted to nothing more than an expression of personal opinion which does not necessitate a new election. In support, the Petition cites the position of Board members Liebman and Walsh in *Sonoma Health Care Center*, 342 NLRB 933 (2004), which requires an objecting party to not only show that improper conduct occurred but also that it interfered with employee free choice to an extent that it materially affected the results of the election. In addition, the Petitioner argues that this election

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¹¹ I find Orellana merely misspoke when referring to the lettering as "gold." I take notice that the San Francisco Giants' team colors have historically been orange and black. As the frame also contains the words "Go Giants," the colors reflected in the less-than-perfect photos in evidence are quite clearly an orange background with black lettering.

should not be set aside due to the Board agent's display on her auto because of the Employer's direct role in publicizing that partisan display to employees.

Unquestionably the license plate frame on the Board's Agents automobile displays a bias in favoring unions and the San Francisco Giants. The former is clearly a problem given the Board agent's mission that day; the latter is not. But no evidence shows that the Board Agent did or said anything that would call attention to either of her preferences while in the presence of any employee or while conducting the election. No evidence establishes that the Board Agent interjected any pro-union bias into the actual election procedures in any manner. Instead, the evidence shows that the Employer affirmatively sought to publicize the Board Agent's bias as reflected by the license plate frame among employees and that but for the Employer's conduct, the Board Agent's personal bias likely would have gone unnoticed.

In *Athbro* the Board adopted the following standard for deciding cases where the conduct of the Board's election agent is called into question by an objection:

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The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.

Applying that standard, the Board set aside the *Athbro* election based on an employer objection supported by evidence showing that an employee who had already voted observed the Board election agent drinking beer with a union agent in a café about a mile from the plant during the period of time between the two voting periods. The employee later reported his observation to the employer.

Although all five Board members reaffirmed the *Athbro* standard in the *Sonoma* case, the five members then split three ways in deciding the issue presented by that case. *Sonoma* involved three separate comments the Board election agent made to the two election observers during the election period which no other employee overheard or heard about. Thus, in response to a question from the union observer as to why companies didn't like unions, the Board agent said, "Companies don't like unions because they cannot fire or hire anyone, and they cannot take benefits from the staff." Later, when the union observer told the Board agent that the company paid \$60,000 to a consultant (presumably to represent its interests during the election campaign), the Board agent replied, "whoa, \$60,000." Later still, the employer observer asked why the Board agent had answered the union observer's question about companies disliking unions. To that the Board agent responded, "Well, I can just give my opinion because I'm not going to vote."

Chairman Battista, and members Shaumber and Meisburg interpreted *Athbro* to require that an election be set aside when the conduct of the Board election agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain. Confidence in the Board election process and standards can be undermined, the three members stated, when Board agents fail to maintain strict neutrality in what they say while conducting Board elections. Applying this standard, Chairman Battista would have set aside the election in Sonoma but members Shaumber and Meisburg would not.

However, members Liebman and Walsh, applying a broader approach, reached a different conclusion as to *Athbro's* fundamental meaning. Beginning with the "strong

presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of employees" as set forth in *Safeway, Inc.* 338 NLRB 525 (2002), these two members ultimately concluded that the *Athbro* standard does not require setting aside an election such as that in the *Sonoma* case where the Board agent makes a statement of personal feelings to a limited audience absent actions that reasonably give the appearance that the election procedures will not be fairly administered. *Sonoma*, 342 NLRB 935.

Clearly, *Sonoma* illustrates that not all preferential statements made by Board agents during the election process necessitate setting aside an election. My colleague, Judge Stephen Fish, recently compiled a compendium of cases dealing with this subject. *See Fresenius USA Mfg.*, Inc., 352 NLRB No. 86 (2008), slip op. 7-9. As said before, the Board agent's license plate frame bearing the words "Go union" shows an unmistakable bias toward unions generally. And there's no question that the words stand out because of the black lettering against a bold orange background.

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But the Board agent's biased display here occurred outdoors away from the polling area well in advance of the election itself. As she alighted from her auto, the company officials on hand to greet her did not take the time to call attention to her presence by introducing her to others, if any, who may have been around the parking lot at the time and thereby provide a basis for associating the Board agent with the pro-union message. Once away from the auto the opportunity to associate her with the license plate message would diminish and ultimately cease inside when she entered the building. The Board agent made no effort to call anyone's attention to the message on her auto but the Employer did and now seeks to rely on what occurred to set aside the election result.

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Although it is true that the Board agent's conduct set up the scenario that followed, neither Linka or Jacoby objected or otherwise expressed any concern to the Board agent promptly upon seeing the pro-union message on her auto. No evidence establishes that any eligible voter saw or associated the offending message on the Board agent's auto until Roberts called it to Nowlin's attention and asked her to take a picture of it ostensibly because he was uncertain about how to use her camera. No evidence shows that Roberts provided Nowlin with direction as to what she should do with the pictures after she took them.

In these circumstances, it is highly unlikely that the pro-union message on the Board agent's auto would have come to Nowlin's attention absent Robert's instruction to her because she works in an office enclosure that has no view of the parking lot. Moreover, after Nowlin took the pictures, she did not return to work or otherwise seek out Roberts to inform him that she had completed the assignment. Instead, she went about showing the photos to other employees. No evidence shows that any of the various managers or supervisors made any attempt to restrain Nowlin's publication of the pictures.

The Board agent's decision to festoon her auto with this display of personal bias and then use the auto to conduct official business clearly reflects poor judgment and cannot be excused. Regardless, her own conduct that day has an inert quality to it. Nothing shows that the Board agent did or said anything in the course of the pre-election conference, the lengthy election period, or the post-election procedure that gave life to the bias displayed on her auto.

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 ¹² Ironically, only Chairman Shaumber and member Liebman now serve on the Board.
 13 In fact, it was not until a few days later that Nowlin provided Roberts with printed copies of the pictures she took because she assumed that he wanted them since he told her to take them.

Put another way, based on this record it would be reasonable to conclude that once she left the environs of her auto, she conducted the election proceedings by the book.

The Board has a longstanding policy that estops a party from profiting by its own misconduct. *Republic Electronics, Inc.*, 266 NLRB 852, 853 (1983). Applying this principle, the Board has refused to entertain an employer's objections to an election based its own conduct. *Standby One Associates*, 274 NLRB 952, 953 (1985). Here, I have concluded that the Employer's own conduct set in motion the actual publication of biased message on the Board agent's auto among the unit employees. Without the Employer's assist, there is no evidence to establish that the pro-union message on the Board agent's license plate frame would have been associated with her by the employees before the voting occurred. For this reason, I recommend that Object No. 2 be overruled.

Summary of Recommendations

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Based on the foregoing discussion, I recommend that the Board sustain the challenges to the ballots of Sheldon Appel, Matthew Barroero and Rita Dumais, and overrule Employer's Objection No. 1. In view of those recommendations, I further recommend that the Board certify the Petitioner as the exclusive collective bargaining representative for the employees employed in the unit found appropriate in the D&DE.¹⁴

	Dated. Washington, D.C.,	September 30, 2000	
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			William L. Schmidt Administrative Law Judge

Dated: Washington D.C. Sontomber 30, 2008

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 ¹⁴ Pursuant to Section 102.69 of the Board's Rules and Regulations, any party may, within fourteen (14) days from the date of this recommended decision, file with the Board in Washington, D.C., an original and eight (8) copies of exceptions thereto. Exceptions must be received by the Board in Washington by October 14, 2008. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director for Region 20. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.